



The Commonwealth of Massachusetts

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

D.T.E. 02-46

November 6, 2003

Petition of the Town of Framingham for a determination of the rates applicable to the transportation and treatment of sewage pursuant to an intermunicipal agreement with the Town of Ashland.

HEARING OFFICER RULING ON TOWN OF FRAMINGHAM'S MOTION TO STRIKE NEW DOCUMENTS ATTACHED TO ASHLAND'S INITIAL BRIEF AND PORTIONS OF ASHLAND'S INITIAL BRIEF

I. INTRODUCTION

On September 23, 2003, the evidentiary hearing in this proceeding was closed.¹ The hearing officer directed the Town of Framingham ("Framingham") and the Town of Ashland ("Ashland") to file initial briefs by October 17, 2003 and reply briefs by October 31, 2003. The hearing officer subsequently granted a joint motion by the parties to extend the filing dates to October 24, 2003 for initial briefs and November 7, 2003 for reply briefs. On October 24, 2003, both parties filed initial briefs. On October 28, 2003, Framingham filed a motion to strike documents that were attached to Ashland's initial brief, as well as portions of Ashland's brief discussing those documents. Specifically, Framingham moved to strike the documents labeled as Exhibits ASH-25 through ASH-33,² and the following pages from Ashland's initial brief: page 13, lines 15-23; page 14, lines 1-15; page 15, lines 7-21; page 16, lines 1-2 and 9-10; and page 18, lines 7-15 and footnote 3. (Motion to Strike at 2-3). On November 4, 2003, Ashland filed an opposition to Framingham's motion to strike.

II. POSITIONS OF THE PARTIES

A. Framingham

As grounds for its motion, Framingham states that the attached documents were not marked and offered into evidence prior to the close of the hearing, and Ashland did not move

¹ The evidentiary hearing was conducted over four full days: June 18, 2003; July 16, 2003; August 20, 2003; and September 23, 2003.

² This ruling refers to these documents as "exhibits" for identification purposes only.

to reopen the record to admit the unmarked documents, as required under 220 C.M.R. § 1.11(8) and the December 9, 2002 Ground Rules, § I.H for this proceeding (Motion to Strike at 1-2). Framingham further argues that even if Ashland had filed the requisite motion to reopen the record, Ashland would not have been able to satisfy the burden to overcome the untimeliness of the proffered documents, because some of the documents indicate that Ashland had obtained the documents prior to the close of the hearing (id.).

B. Ashland

As grounds for its opposition, Ashland states that it received documents, which ultimately were entered into evidence as Exhibits FR-45 and FR-46, on September 16, 2003, only four days prior to the hearing (Opposition at 1). Ashland contends that it was impossible for Ashland's experts to analyze the documents, because the source data for the information contained in those exhibits was not known until Framingham presented its rebuttal at the end of the last day of hearings on September 23, 2003 (id.). Ashland claims that although it had obtained Exhibits ASH-31, ASH-32, and ASH-33 prior to the last day of hearings, it was unable to understand how these documents were relevant to Exhibits FR-45 and FR-46 until after the hearings, because it did not know the "scope and intent" of Exhibits FR-45 and FR-46 (id.). Ashland contends that Exhibits ASH-24 through ASH-33 are "helpful" to address Framingham's attempts to cut off Ashland's access to Framingham's sewerage system, flow capacities at the Chestnut Street and Bracket Road Pump Stations, rainfall levels, and Ashland's alleged violation of the intermunicipal agreement discharge limits and alleged resulting surcharging in Framingham's pipes (id. at 2-3).

Ashland argues that nothing in the Department's regulations, specifically 220 C.M.R. § 1.11(8), or the Ground Rules prohibit it from presenting new arguments or information in its brief (id. at 2). Ashland maintains that because the attached documents are largely public documents, the information is "easily obtainable," and therefore, Ashland could simply present its new arguments without submitting the new documents (id.). Ashland further argues that 220 C.M.R. § 1.11(7) implies that the Department has the discretion to allow the filing of the new documents, because the documents are "helpful to clarify exhibits already filed" (id.). In addition, Ashland claims that it did not formally "rest," but rather, only "assent[ed]" that there was no need to proceed further with any additional hearings after the conclusion of the September 23, 2003 hearing" (id. at 3). That is, Ashland claims that it did not "rest" with regards to discussing new information and arguments in its brief (id.). Finally, Ashland argues that even if the exhibits are to be stricken, the portions of Ashland's brief that Framingham seeks to have stricken are excessive, overreaching, and beyond the scope of the information contained in the exhibits (id.).

III. ANALYSIS AND FINDINGS

The hearing in this proceeding was closed on September 23, 2003 (Tr.4, at 873). Absent a motion for good cause shown from either party pursuant to 220 C.M.R. § 1.11(7), the only additional documents that the parties were permitted to file as documentary evidence after the hearing was closed were the outstanding responses to record requests.³ 220 C.M.R. § 1.06(h). The outstanding record request to Ashland was for a statement of the maximum flow capacity of the pumps at the Chestnut Street station, which Ashland filed on September 30, 2003 (Tr.4, at 677; DTE-RR-7). Ashland did not file a motion for leave to file Exhibits ASH-25 through ASH-33, and therefore, these documents are not properly filed and are not in evidence.⁴

Even if the Ashland's opposition to the motion to strike is to be read as a motion for leave to file additional evidence, Ashland has not demonstrated good cause. Although Framingham ordinarily would not have been obligated to serve its rebuttal exhibits until the time that Exhibits FR-45 and FR-46 were introduced, the hearing officer directed Framingham to provide copies of such exhibits to Ashland at least seven days prior to the hearing to allow Ashland an opportunity to review them (Tr.3, at 657). Because Framingham provided copies of the rebuttal documents by September 16, 2003, Ashland had a reasonable amount of time to prepare cross-examination on Exhibits FR-45 and FR-46 prior to Framingham's expected rebuttal. Regarding Exhibits ASH-31 through ASH-33, the specificity of Ashland's queries to the MWRA regarding average daily flow at the meters identified in Exhibits FR-45 and FR-46, and regarding daily rainfall records, suggests that Ashland did sufficiently comprehend what Framingham intended to demonstrate in rebuttal (Exh. ASH-33).⁵

³ After Ashland rested its direct case (see Tr.3, at 647), Ashland could only have been entitled to offer evidence in the course of its cross-examination of Framingham's witnesses. See 220 C.M.R. § 1.11(8). Moreover, Ashland's claim that it did not "rest" is to no avail, because the hearing was closed. Id. The Department's regulations do not provide for the offering of extra-record evidence in party briefs. 220 C.M.R. § 1.11(4).

⁴ Ashland also submitted a document labeled as Exh. ASH-24, which previously was entered into evidence as Exh. ASH-16.

⁵ Even if Ashland had supplemented its cross-examination of Framingham's witness, Paul Brinkman, regarding rainfall levels (see Tr. at 826), with Exhibits ASH-31 and ASH-32, those documents do not contradict his testimony, and only purport to demonstrate rainfall during the relevant period in "eastern Massachusetts," as well as Boston and various municipalities other than Framingham or Ashland.

Ashland's general claim that Exhibits ASH-25 through ASH-33 are "helpful" in that they clarify previously submitted documents does not demonstrate good cause to admit new documents into evidence after the record has closed. The four days of evidentiary hearings spanned across several months due to the scheduling conflicts between counsel. Ashland had a reasonable opportunity to prepare its case while the evidentiary record was still open. Furthermore, the evidentiary record was sufficiently developed at the hearings on the points that Ashland now seeks to "clarify."

Ashland is incorrect that it may discuss information without introduction of exhibits. Briefs must make "reference to the pages of record or exhibits where the evidence appears." 220 C.M.R. § 1.11(4); see also AT&T Communications of New England, D.P.U. 91-79, at 8-11 (1992)(striking portions of brief referring to extra-record evidence on facts in dispute). The Department must determine this case based on "substantial evidence" in the record. G.L. c. 30A, § 14(7)(e). The portions of Ashland's initial brief that Framingham moves to strike rely upon extra-record evidence.

IV. RULING

Because Ashland has not demonstrated good cause to file documentary evidence after the hearing was closed, and because portions of Ashland's brief make reference to documents not part of the evidentiary record, Framingham's motion to strike exhibits and portions of Ashland's brief is GRANTED.

The following documents are to be stricken from the record: Exhibits ASH-25 through ASH 33. The following portions of Ashland's brief are also to be stricken from the record: page 13, lines 15-23; page 14, lines 1-15; page 15, lines 7-21; page 16, lines 1-2 and 9-10; and page 18, lines 7-14⁶ and footnote 3.

_____/s
Jesse S. Reyes, Hearing Officer

⁶ The portions of the brief relying upon Exh. ASH-33 on page 18 are lines 7 through 14, not 15.